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IN THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

NO. 83-6490

GARY BRADFORD CONE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner was denied due process and equal protection by the judgment of the Supreme Court of Tennessee finding harmless error the jury's erroneous finding of an aggravating circumstance at the sentencing hearing; and

2. Whether the petitioner was denied a fair trial as to guilt by a "death qualified" jury.

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## OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 665 S.W.2d 87.

## JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. §1257. Respondent submits that this record does not present a substantial federal question. The judgment of the Supreme Court of Tennessee was entered on January 23, 1984.

## STATEMENT OF THE CASE

On August 19, 1980, the Shelby County Grand Jury returned two indictments, the first charging the defendant Gary Bradford Cone, with murder in the first degree of Cleopatra Todd in the perpetration of a burglary (count one) and in common law form (count two); the second charging the defendant with murder in the first degree of Shipley O. Todd in the perpetration of a burglary (count one) and in common law form (count two). The offenses were alleged to have been committed on August 10, 1980.

On September 5, 1980, the Shelby County Grand Jury returned four indictments charging the defendant, as follows: assault with intent to commit first-degree murder upon Herschel Dalton, assault with intent to commit first-degree murder upon B.C. Allen, assault with intent to commit first-degree murder upon Douglas Clark, and robbery by use of a deadly weapon upon Aaron Hayes, Jr. The offenses were alleged to have occurred on August 8, 1980.

The six (6) indictments were ordered consolidated for trial on March 25, 1982. The assault and robbery indictments were amended on March 25, 1982, to show that the offenses occurred on August 9, 1980.

On April 12, 1982, jury selection began in Shelby County Criminal court, continued through and was concluded on April 15, 1982.

Following the defendant's plea of not guilty, trial testimony commenced on April 16, 1982, continued through April 17, 19, 20, 21, and 22, and was completed on April 23, 1982. On April 23, 1982, the jury deliberated and found the defendant guilty of murder in the first degree of Cleopatra Todd as charged in both counts of the indictment and murder in the first degree of Shipley O. Todd as charged in both counts of the indictment. The jury further found the defendant guilty of assault with intent to commit first-degree murder upon Herschel Dalton, assault with intent to commit first degree murder upon B.C. Allen, and assault with intent to commit first-degree murder upon Douglas Clark, with punishment fixed at imprisonment in the state penitentiary for not less than ten (10) years nor more than twenty-five (25) years on each count. The jury further found the defendant guilty of robbery by use of a deadly weapon upon Aaron Hayes, Jr., and fixed his punishment at life imprisonment in the state penitentiary.

On that same day, a bifurcated hearing on the issue of punishment for the two first-degree murder convictions was held. The jury deliberated and sentenced the defendant to death for each murder, finding unanimously the following aggravating circumstances: (1) the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use of threats or violence to the

person; (2) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder; (3) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) the murder was committed for the purpose of avoiding, interferring with, or preventing a lawful arrest or prosecution of the defendant or another. The jury found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances so found. The trial judge entered judgment in accordance with the jury's verdict on the same day.

On May 17, 1982, the defendant filed a motion for a judgment of acquittal or, in the alternative, motion for new trial. The trial court denied the motion on June 24, 1982.

On January 23, 1984, the Tennessee Supreme Court affirmed the petitioner's convictions and sentences imposed.

## REASONS FOR DENYING THE WRIT

Respondent submits that the Supreme Court of Tennessee correctly affirmed the trial court's judgment. The Supreme Court did not decide a federal question of substance not heretofore determined by this Court or decide such question in a way not in accord with the applicable decisions of this Court; nor did the Supreme Court of Tennessee decide a federal question in a way in conflict with another court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the Court in its sound discretion should deny the writ sought here.

## ARGUMENT

### I.

THE SUPREME COURT OF TENNESSEE CORRECTLY APPLIED THE HARMLESS ERROR RULE TO THE JURY'S ERRONEOUS FINDING OF AN AGGRAVATING CIRCUMSTANCE.

The jury found the following four statutory aggravating circumstances:

> (1) the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use of threats or violence of the person;
>
> (2) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder;
>
> (3) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and
>
> (4) the murder was committed for the purpose of avoiding, interferring with, or preventing a lawful arrest or prosecution of the defendant or another.

The jury found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances so found.

In addition to the four aggravating factors specifically found by the jury, a fifth (the murder was committed during the perpetration of a felony) was clearly applicable, since the jury found the petitioner guilty of felony murder in the perpetration of burglary. Tenn. Code Ann. §39-2-203(i)(7).

The Supreme Court of Tennessee, in reviewing the petitioner's death sentence as required by statute, Tenn. Code Ann. §39-2-205(c), determined that the evidence probably was not sufficient to sustain the jury's finding

that the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder. However, in view of the jury's finding of three other statutory aggravating circumstances supported by the evidence, the clear presence of another such circumstance not specifically found by the jury, and the absence of any mitigating circumstances, the Court determined that any error was harmless beyond a reasonable doubt. 665 S.W.2d at 95.

There was nothing to prevent the Tennessee Supreme Court from applying the harmless error analysis to this case. See Barclay v. Florida, ____ U.S. ____, 103 S. Ct. 3418, ____ L.Ed.2d ____ (1983). Moreover, the Tennessee Supreme Court has not applied the harmless error analysis inconsistently in prior or subsequent cases. The Court explicitly distinguished State v. Pritchett, 621 S.W.2d 27, 39 (Tenn. 1983), in which the Court was unable to apply the analysis where the proof was insufficient to support one of two aggravating circumstances. 665 S.W.2d at 95. See also State v. Moore, 614 S.W.2d 348, 351-352 (Tenn. 1981) (holding harmless error analysis inappropriate where proof insufficient to support one of two aggravating circumstances). Contrary to petitioner's contention, the case of State v. Buck does not evidence inconsistent application of the harmless error analysis. The reversible error found in Buck was the admission of inadmissible evidence to support an aggravating cirtcumstance, not the insufficiency of proof of the circumstance. Moreover, there were other independent grounds for reviewing the death sentence in Buck, i.e., the use of hearsay evidence to establish prior convictions, an incorrect jury charge[1], and the improper

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[1] The petitioner notes that the jury in the instant case was given a similar incorrect charge. However, this issue was not raised by the petitioner in the state courts. Furthermore, a mere error of state law is not a denial of due process. Engle v. Isaac, 456 U.S. 107, 121 n.21, 102 S.

closing argument of the prosecutor. There is no showing of a denial of due process or equal protection in this case. The respondent submits that the petitioner's contention on this issue does not merit the granting of certiorari.

II.

THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S CONTENTION THAT HE WAS DENIED A FAIR TRIAL BY THE EXCUSAL OF SEVERAL PROSPECTIVE JURORS FOR CAUSE.

On direct appeal to the Tennessee Supreme Court, the petitioner challenged the excusal for cause of five prospective jurors during voir dire, contending that they were improperly excused because of their religious scruples against the death penalty. The Tennessee Supreme Court rejected the claim, finding that those jurors expressed irrevocable and unconditional refusal to consider the imposition of the death penalty. 665 S.W.2d at 92. The record supports that finding. Accordingly, those jurors were properly excused for cause. Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The respondent submits that this issue does not warrant the granting of certiorari.

For the first time, the petitioner now contends that he was denied a fair trial as to guilt because a jury from which jurors unalterably opposed to capital punishment have been excluded is "death-prone" and, therefore, "guilt-prone." This Court has rejected such a contention as a matter of law:

> We simply cannot conclude, on the basis of the record now before us or as a

Ct. 1558 n.21, 71 L. Ed. 2d 783 (1982).

> matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.

Witherspoon v. Illinois, 391 U.S. 510, 517-518, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). There is no evidence in the instant record that this particular jury was "guilt-prone." Absent some proof, it must be assumed that the jurors were carefully selected and the resultant jury was fair and impartial on all issues. The respondent submits that this allegation does not merit the granting of certiorari.

## CONCLUSION

For these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief has been forwarded by first-class mail, postage pre-paid to, Mr. John C. Dice, Attorney for the Petitioner, 100 North Main #2504, Memphis, Tennessee 38103 on this the 25th day of April, 1984. I further certify that all parties have been served.

GORDON W. SMITH
Assistant Attorney General